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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 1104

REX CARDEN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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The petitioner, Rex Carden, seeks a review of a final judgment of the Tennessee Supreme Court announced January 18, 1966. The opinion is unreported but it is included in the Appendix to the petition for certiorari.

JURISDICTION.

The jurisdiction of the United States Supreme Court to review the opinion of the Tennessee Supreme Court is admitted if a federal question was presented to the state court for consideration, but on the other hand, counsel for the State of Tennessee insists that no federal constitutional question was raised at any place in the State proceedings.

ARGUMENT.

Counsel for the petitioner insists that the federal constitutional question was raised first in the motion for a new trial. The grounds of the motion wherein he insists this question was raised is as follows:

> "That the charge of the court in reference to Section 39-104, T. C. A., was prejudicial to the defendant's rights to a fair and impartial trial as said statute suggests a higher sentence than that under which the defendant was indicted, which was section 57-137, T. C. A."

If this part of the motion for a new trial raises a federal question, it is not stated what provision of the federal constitution has been contravened nor was it considered by the Tennessee Supreme Court that a federal constitutional question had been raised. In the Tennessee Supreme Court opinion it is said regarding this matter:

> "T. C. A. Sec. 57-137 fixes the punishment for violation of this section at not less than two years but does not provide a maximum number of years. The Trial Judge charged the jury the maximum punishment would be ten years. This was under authority of T. C. A. Sec. 39-104. The jury returned a verdict of guilty fixing the maximum sentence at three years. The Court sentenced the defendant to serve not less than two or more than three years in the State Penitentiary. This is correct. Everhart v. State, 194 Tenn. 272. The assignment of error directed to this matter is overruled."

As indicated by the case cited in the foregoing, the Supreme Court of Tennessee in 1951 held that since Section 57-137, Tennessee Code Annotated, only provided a minimum punishment for a violation of said statute, it

was necessary to look to Section 39-104, Tennessee Code Annotated, to determine the maximum. This latter section has been applied in other criminal convictions in this State when the punishment was not otherwise fixed by statute. The Tennessee Supreme Court in **Burke v. State**, 157 Tenn. 105, applied the statute (Section 39-104, Tennessee Code Annotated) to fix the minimum punishment for an offense where the maximum punishment only was otherwise fixed. The Court said at Page 119 of that opinion:

> "The Statute, Section 6582 of Shannon's Code, prescribing punishment for fraudulent breach of trust fixes the maximum of not exceeding ten years in the Penitentiary without fixing a minimum. Not being fixed by this Statute the minimum punishment is determined by reference to Section 7206 of Shannon's code which forbids commitment for less than twelve months. The Indeterminate Sentence Law, Chapter 8, Acts 1913, provides for an indeterminate sentence of not less than the minimum fixed by Statute, and not more than the maximum assessed by the jury. See Chapter 52, Acts 1923."

Because of the foregoing, it is insisted by counsel for the State of Tennessee that the two statutes together (Section 57-137 and Section 39-104, Tennessee Code Annotated) following a consistent rule of construction by the Tennessee Supreme Court for a period of almost forty years (the **Burke** opinion was rendered in 1928) sets out very clearly the minimum and maximum punishment that can be imposed upon a defendant convicted for transportation or possession of unstamped alcoholic beverages in quantities of more than three gallons. It is difficult to understand how it can be insisted that the maximum punishment stated by the Supreme Court of this State, based upon a construction of two statutes, can be less clear to a defend-

ant that if it were all set out in one section of the official Code.

The contention made in this petition is unique in that there is no objection to the definition of the offense or that it is too vague and uncertain. The only complaint made is relative to the punishment.

Counsel for the petitioner has cited a number of recent opinions by the United States Supreme Court in support of his position. However, he does not make an analysis of these cases nor cite excerpts therefrom. Counsel for the State of Tennessee has examined a majority of these cases and in all of them the complaint about indefiniteness and vagueness, etc., had to do with the definition of the offense rather than the term of punishment, and in some of these cases it was said that in order for the United States Supreme Court to determine whether or not the state statute was vague it would look to the construction placed upon the statute by the court of last resort in the state where the statute existed.

This Court said in **Cramp v. Board of Public Instruction of Orange County, Florida,** 368 U. S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 281, with respect to the Florida statute under consideration in that case:

> "We accept without question this view of the statute's meaning, as of course we must. This authoritative interpretation by the Florida Supreme Court "puts these words in the statute as definitely as if it had been so amended by the legislature." Winters v. People of State of New York, 333 U. S. 507, 514, 68 S. Ct. 665, 669, 92 L. Ed. 840. See Kingsley Intern. Pictures Corp. v. Regents, 360 U. S. 684, at 688, 79 S. Ct. 1362, at 1365, 3 L. Ed. 2d 1512; Albertson v. Millard, 345 U. S. 242, 73 S. Ct. 600, 97 L. Ed. 983; United States v. Burnison, 339 U. S. 87, 70 S. Ct. 503,

94 L. Ed. 675. Aero Mayflower Transit Co. v Board of R. R. Commissioners, 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99."

CONCLUSION.

Thus, it is insisted by counsel for the State of Tennessee that in order for a determination to be made relative to the question sought to be determined, that is, whether or not the punishment fixed for the offense for which the petitioner was convicted is so vague and indefinite that if put to trial on the same it would be in violation of his constitutional right undesignated except in the petition for writ of certiorari, this Honorable Court would by its own decisions look to the construction that had been placed upon the matter by the Supreme Court of Tennessee, and that construction makes it clear that the punishment for the petitioner's offense upon conviction is not less than two nor more than ten years in the State Penitentiary.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

THOMAS E. FOX,
Assistant Attorney General.

I certify that I forwarded a copy of this Answer to Petition for Writ of Certiorari to the Honorable William Earl Badgett, Attorney at Law, 608 Bank of Knoxville Building, Knoxville, Tennessee, on this the 11 day of March, 1966.

Thomas E. Fox,
Assistant Attorney General.